COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

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May 16, 1996 DOCKET FILE COPY ORIGINAL

Mr. William F. Caton
Secretary
Federal Communications Commissio
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Hand Delivered

Re: In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Docket No. 96-98

Dear Secretary Caton:

Enclosed are an original and twelve copies of the Initial Comments of the Pennsylvania Public Utility Commission. By separate cover letter, in accordance with paragraph 292 of the Commission's Order, we have also sent a copy of our Comments on diskette to Janice Myles of the Common Carrier Bureau.

Please do not hesitate to contact the undersigned if you have any questions concerning this matter.

Very truly yours,

Maureen A. Scott
Assistant Counsel

MAS/ms

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	**CC Docket No. 96-98**
	)	
	)	

INITIAL COMMENTS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION ON THE NOTICE OF PROPOSED RULEMAKING

I. Executive Summary of the PaPUC's Comments.

On April 19, 1996, the Federal Communications Commission ("FCC" or "Commission") released a Notice of Proposed Rulemaking ("NOPR") intended to implement the interconnection provisions of the Communications Act of 1934, as amended by the 1996 Act, in particular § 251. The Pennsylvania Public Utility Commission ("PaPUC") submits the following Comments in response to the Commission's NOPR.[1]

The NOPR wrongly presumes that states such as Pennsylvania have not taken any actions to address many of the issues raised in the NOPR or have not adopted any procompetitive policies to-date. To the contrary, within the last three years, the PaPUC has certificated four competitive local service providers in Pennsylvania, and has another four applications by competitive local service providers pending. Further, as discussed in more detail in § III, the

[1]As requested by the FCC, the PaPUC has included an executive summary of its comments. The PaPUC has also attempted in responding to the questions posed by the Commission to follow the format of the Commission's NOPR as closely as possible. In most instances, the PaPUC has identified the relevant paragraph of the NOPR to which its discussion pertains.

PaPUC expects to conclude several pending proceedings which address many of the same issues raised in the NOPR in the second quarter of 1996. PaPUC was also one of the first states to issue an implementation order on the 1996 Act to ensure that our existing procedures adequately addressed and comported with the Act's various objectives and requirements.[2] Consequently, we believe one of the fundamental premises of the NOPR is in error, i.e., that states have not taken actions in furtherance of the Act's objectives and therefore that the FCC must act for them. This fails to recognize the significant progress that many states, such as Pennsylvania, have made in developing and adopting procompetitive initiatives in furtherance of both the Act's and Pennsylvania law's objectives.

This fundamental premise appears to underlie one of two very different approaches proposed by the Commission to implement the interconnection and local competition provisions of the 1996 Act. This first approach, and the one the FCC seems inclined to adopt at this time, is highly preemptive in nature and would result in an inflexible, highly detailed and complex set of federal mandates, which would clearly violate the 1996 Act in a number of ways:

(1) A uniform one-size fits all approach containing inflexible detailed federal interconnection mandates is inconsistent with Congressional intent and the express provisions of the 1996 Act.

(2) Precluding enforcement of state interconnection policies that are consistent with the Act would be an express violation of § 251(d)(3).

(3) Preemption of state costing methodologies and pricing standards would be an express violation of § 252(d) of the Act.

(4) The Commission has no authority to establish federal mandates in areas which Congress specifically entrusted to the States for resolution, including proceedings

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[2] In Re: Implementation of the Telecomunications Act of 1996, Tentative Decision, Docket No. M-00960799 (Entered March 14, 1996).

under §§ 251(f), 252(d), and 252(a) of the Act.

(5) The Commission's use of § 253 to preempt state interconnection requirements is unlawful.

This first approach completely contradicts the language of the statute and is not supportable. There is no doubt that any attempt by the FCC to impose an inflexible federal mandate which does not accommodate or incorporate state interconnection policies that are consistent with the Act's objectives would run afoul of § 251(d)(3) of the Act. Congress clearly did not contemplate that the FCC would completely undo the procompetitive initiatives of many states already in place or which may be implemented in the future and replace them with a hastily devised scheme of federal requirements. The concern over inappropriately prescriptive federal rules is grounded in our belief that not only is such an approach in conflict with the express wording of the Act; such an approach would defeat the underlying legislative intent to promote procompetitive policies in local markets. The preemption of state policies on interconnection would retard rather than promote local competition because states will be required to revisit and revise existing procompetitive policies that already are in place.

The second general approach which the Commission seeks comment upon would allow a range of state interconnection requirements under § 251 which are consistent with the Act. The PaPUC strongly supports this approach and urges the Commission to adopt it. This approach is consistent with the Act because the Commission is expressly prohibited under § 251(d)(3) of the Act from precluding enforcement of any state policies that are consistent with the Act. Undoubtedly, many different state approaches will be consistent with the Act's requirements and, therefore, lawful under the Act. If, on the other hand, the Commission adopts the highly inflexible one-size-fits-all approach which it appears to favor in the NOPR, it may

necessarily have to preclude enforcement of many state policies which are nonetheless consistent with the Act's provisions (if at variance with the FCC's approach) in violation of § 251(d) of the Act.

We urge the Commission, in establishing a range of policies to set "minimum" criteria rather than adopting highly complex and detailed requirements which may not be appropriate in many cases. The Commission is rightly concerned that circumstances may vary between states making rigid federal requirements unacceptable. The Commission's minimum standards should permit some variance by states where circumstances in the local jurisdiction warrant and the best interests of the parties and public would be served thereby. Rather than imposing a highly inflexible and complex scheme of federal regulatory requirements on industry and states alike, the FCC should follow the path laid out by Congress in the Act and develop an overlay which promotes competitive state policies rather than tearing them down and starting anew.

Section 251, by its express terms, is applicable to all interconnection agreements, including those between incumbent LECs and competing wireline carriers, between incumbent LECs and CMRS providers, and between LECs and neighboring wireline or wireless providers.

Section 152(b) applies to both § 251 and 252 of the Act, since Congress did not expressly except either § 251 or 252 from 152(b)'s application. Had Congress intended that § 152(b) not apply, it would have expressly excepted these provisions from § 152(b)'s application as it did § 332 of the Omnibus Budget Reconciliation Act ("OBRA") relating to Commercial Mobile Radio Service ("CMRS") providers. Consequently, where jurisdictional questions arise due to ambiguities in the statute, § 152(b) would be applicable.

The Commission cannot use § 253(a) to indirectly preempt state interconnection requirements promulgated pursuant to state law or § 251 of the Act. The conference report makes clear that the purpose of § 253(a) is to prohibit express state or local regulations, statutes etc. which act to preclude entry altogether into any interstate or intrastate market. There is no authority anywhere in the Act for the Commission to use § 253(a) to preempt inconsistent or "undesirable" state interconnection policies. Moreover, the Commission makes repeated inquiries throughout its NOPR on the "appropriateness" or "consistency" of state interconnection policies. However, nowhere in the Act is the Commission given any authority to preempt state policies using ad hoc determinations made as a result of the anecdotal statements of a few parties in this proceeding. Use of the record in this proceeding to preempt "undesirable" state interconnection policies would violate the underlying spirit and intent of the Act.

The Commission has no authority over the specific interconnection costing and pricing methodologies used by states pursuant to § 252(d) of the Act. Congress conferred this responsibility upon the states under § 252(d) of the Act. The Commission cannot use the very general provisions of § 251 to confer upon itself the very specific authority over costing and pricing given states in § 252(d). If the Commission adopts regulations pertaining to costing and pricing, they should be in the form of nonbinding "guidelines" which states may elect to follow at their option.

We believe that "final offer" arbitration may be an expedient means for the Commission to use to resolve disputes coming to it under § 252(e)(5). Alternatively, the Commission could simply put carriers on notice that it will use the rules of the American Arbitration Association to govern any arbitration proceedings it must conduct because of a state's failure to act.

A state should not be deemed to have "failed" to act until the relevant statutory deadlines have expired. Automatic approvals pursuant to § 252(e)(4) should not be deemed to be a "failure to act" by the relevant state regulatory agency. While a state commission is to review preexisting agreements, it is not necessary that a state commission formally approve all interconnection agreements under § 251(e)(4). Additionally, any preemption by the FCC should only pertain to the particular "matter or proceeding" for which the FCC must assume state responsibility, and in no instance can § 252(g) be construed to give the FCC continuing or ongoing jurisdiction over the same or related matters in the future.

II. Summary of Relevant Statutory Provisions As They Affect State/Federal Authority Over Interconnection Issues

As the Commission notes, §§ 251 ("Interconnection"), 252 ("Procedures for Negotiation, Arbitration, and Approval of Agreements") and 253 ("Removal of Barriers to Entry"), taken together eliminate any existing barriers to entry into any interstate or intrastate market, establish the terms and conditions for interconnection to the networks of LECs and incumbent LECs, provide the process for pricing affected services and the process for review and approval of both negotiated and arbitrated interconnection agreements. Importantly, these provisions, most notably §§ 251 and 252, together with § 152(b), also define the respective spheres of state/federal authority over interconnection matters.

One of the primary purposes of §§ 251 and 252 appears to be to establish the terms and conditions for competition in the local market. Traditionally, matters pertaining to local service have been subject to the exclusive jurisdiction of the states. Section 152(b) of the Communications Act of 1934 fences off from FCC regulation and thereby gives the states exclusive authority over matters pertaining to ..[c]harges, classifications, practices, services,

facilities, or regulations for or in connection with intrastate communication service." In contrast, § 151 and § 152(a) gives the FCC exclusive jurisdiction over matters pertaining to interstate communications services. Through the express wording in the statute, it is clear that Congress intended that the FCC play a role in the development of competition in the local service market.

Nonetheless, it is also clear that Congress did not intend to exempt §§ 251 and 252 from § 152(b)'s application, or it would have made an express exemption to 152(b) as it did when it preempted state regulation of mobile service rates and entry. Therefore, it must be presumed that Congress intended that § 152(b) would continue to govern and define the respective roles of the FCC and states if questions of a jurisdictional nature arose in interpreting the interconnection provisions of the statute.

A. Section 251

The Commission's primary responsibility is under § 251 of the Act wherein it is charged with establishing regulations to implement the general interconnection obligation of telecommunications carriers, LECs and incumbent LECs discussed earlier.

The Commission commenced this rulemaking pursuant to § 251(d) which requires that "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." While the Commission's rulemaking addresses provisions in §§ 251, 252 and 253, its authority over interconnection matters is contained almost exclusively in § 251. Further, the 6 month deadline applies only to the FCC's regulations implementing § 251 of the Act.

The Commission's NOPR contains very detailed proposals with regard to the interconnection and unbundling requirements of the Act. The extent of the Commission's § 251 authority, at least with respect to intrastate interconnection and access issues applicable to LECS, is limited, however, by the provisions of § 251(d)(3) which expressly preserves state access and interconnection obligations of local exchange carriers:

> (3) PRESERVATION OF STATE ACCESS REGULATIONS.-- In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulations, order, or policy of a State commission that–
>
> > (A) establishes access and interconnection obligations of local exchange carriers;
> >
> > (B) is consistent with the requirements of this section; and
> >
> > (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Therefore, the Commission's rules must accommodate and incorporate a range of state interconnection and unbundling policies that are otherwise consistent with the provisions of the Act.

B. Section 252

Like § 251 which primarily defines the FCC's responsibilities, § 252 primarily defines the states' responsibilities. The responsibilities of the states under Section 252 are primarily threefold: (1) to determine LEC costs and establish appropriate prices for interconnection and network elements, transport and termination of calls, and wholesale prices when services are being offered through the resale of LEC facilities; (2) to mediate or arbitrate LEC

interconnection agreements; and (3) to approve LEC interconnection agreements under standards established in § 252(e).

The delegation of authority to the states to determine interconnection "costs" and "prices" under the Act is contained in subpart (d) of § 252 which reads as follows:

> (d)PRICING STANDARDS.--
>
> (1)INTERCONNECTION AND NETWORK ELEMENT CHARGES.-- Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--
>
> (A) shall be--
>
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
>
> (iii) nondiscriminatory, and
>
> (B) may include a reasonable profit.
>
> (2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC.
>
> (A) IN GENERAL.--For purposes of compliance by anincumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
>
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
>
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the

> additional costs of terminating such calls.
>
> (B) RULES OF CONSTRUCTION.--This paragraph shall not be construed--
>
> (i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or
>
> (ii) to authorize the Commission, or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.
>
> (3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES.--For purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

In contrast to the very general language of § 251(c)(2)(D) through which the Commission argues it indirectly derives the authority to establish federal interconnection costing and pricing methodologies, the grant of authority to states under § 252(d) to cost and price interconnection elements is very direct and specific. There is no question when the provisions of both sections are read together that Congress intended this responsibility to reside with the states. Neither §§ 251 or 252, or any other provision of the statute for that matter, gives the Commission any express authority to develop federal mandates which would ultimately govern the individual interconnection costing and pricing methodologies used by states under § 252(d).

The only responsibilities connected with pricing and costing development that the Commission may assume are attendant or expressly dependent upon a state's failure to act under § 252(g). Section 252(g) provides that where a state fails to act to carry out any of its obligations under § 252, the Commission may preempt the state and act for it with respect to the state's responsibilities under § 252:

> (5) COMMISSION TO ACT IF STATE WILL NOT ACT.--If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

C. **Section 253**

Section 253(a) provides that:

> ...No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

The conference agreement adopted the Senate provisions on this section. Under the Senate bill, subsection (a) "...preempts any State and local statutes and regulations, or other State and local legal requirements, that may prohibit or have the effect of prohibiting any entity from providing interstate or intrastate telecommunications services." Clearly the types of requirements referred to were traditional barriers to entry which recognized only one monopoly local service provider with exclusive rights to provide service within its defined service area. There is no authority for the Commission to use § 253(a) in the manner suggested in the NOPR to preempt state interconnection policies which it believes are either "undesirable" or inconsistent

with the Act's provisions. Had Congress intended to give the FCC broad powers of preemption over state interconnection provisions it would have expressly included this provision in § 251 of the Act.

III. NOPR Background and Overview (paras. 1-24)

The Commission notes at para. 5 that at the time the 1996 Act was signed, 19 states had in place some rules opening local exchange markets to competition. While Pennsylvania was not mentioned by the FCC, the PaPUC has also made significant strides to meet the Act's objectives. Chapter 30 of the Pennsylvania Public Utility Code, enacted in 1993, contains many of the same goals and objectives of the 1996 Act. Indeed, the two pieces of legislation compliment one another in many respects. Like many of the provisions of the 1996 Act, Chapter 30 establishes a framework for competition, regulatory reform, infrastructure modernization and deregulation.[3] More specifically, like § 253 of the 1996 Act, Chapter 30 opens the local service market to competition in Pennsylvania.[4] Like § 251 of the 1996 Act, Chapter 30 requires LECs to unbundle their networks into basic service elements that can be used by other carriers to provide competitive local exchange.[5] Like § 252 of the 1996 Act, Chapter 30 imposes upon the PaPUC the obligation to establish just and reasonable rates for interconnection and network elements. Finally, Chapter 30 also imposes non-discrimination

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[3] See 66 Pa.C.S. § 3001 et seq.

[4] See 66 Pa.C.S. § 3009(a).

[5] Section 3005(e)(1), 66 Pa.C.S. § 3005(e)(1) requires the local exchange telecommunications company to unbundle each basic service function on which the competitive service depends and to make the basic service functions separately available to any customer under nondiscriminatory tariffed terms and conditions, including price, that are identical to those used by the local exchange telecommunications company and its affiliates in providing its competitive service.

requirements and like § 251 eliminates any prohibitions on resale for competitive services which may have existed in a monopoly environment.[6]

For the last three years we have been in the process of implementing Chapter 30. We have already authorized four providers to offer competitive local service.[7] At least three other providers have recently filed applications to provide competitive local service in all of Bell Atlantic's service territories in Pennsylvania. The operating authority of the four certificated competitors was expressly conditioned upon compliance with the terms and conditions for competitive local service provisioning ultimately adopted by the PaPUC in ongoing proceedings now before it.[8]

These proceedings, which address virtually all of the issues raised by the FCC in its NOPR, are now in their final stages.[9] The PaPUC expects to conclude all of these major local

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[6]See, 66 Pa. C.S. § 3005(g).

[7]See Application of MFS Intelenet of Pennsylvania, Incorporated for a certificate of public convenience and necessity in order to operate as a local exchange telecommunications company in the areas served by Bell Telephone Company of Pennsylvania within the Philadelphia and Pittsburgh LATAs, and to establish specific policies and requirements for the interconnection of competing local exchange networks, et al., Docket No. A-310203F0002, et al., Opinion and Order (Entered October 4, 1995).

[8]Id.

[9]See Application of MFS Intelenet of Pennsylvania, Incorporated for a certificate of public convenience and necessity in order to operate as a local exchange telecommunications company in the areas served by Bell Telephone Company of Pennsylvania within the Philadelphia and Pittsburgh LATAs, and to establish specific policies and requirements for the interconnection of competing local exchange networks, et al., Docket No. A-310203F003, et at., ("MFS II"); In Re: Formal Investigation to Examine and Establish Updated Universal Service Principles and Policies for Telecommunications Services in the Commonwealth; Interlocutory Order, Initiation of Oral Hearings Phase, I-940035; and Investigation Pursuant to Section 3005 of the Public Utility Code, 66 Pa.C.S. Section 3005, and the Commission's Opinion and Order at Docket No. P-930715, to Establish Standards and Safeguards for competitive Services, with Particular Emphasis in the Areas of Cost Allocations, Cost Studies, Unbundling, and Imputation;

competition dockets within the next few months, indeed within an almost identical time frame to that established by the FCC for completion of its final order in this docket. The presence of these ongoing state proceedings and the need to avoid any appearance that we may be prejudging issues before us at the state level will preclude us in many instances from taking a definitive position on the substantive issues in this docket.

Our comment on the remaining discussion appearing in this section of the NOPR centers on the Commission's apparent improper interpretation of § 253(a). We strongly disagree with the Commission's stated intent in paras. 16 and 22 of the NOPR, to use § 253 to preempt state interconnection requirements which it construes are "barriers to entry"; and to otherwise use its § 251 rules "to give content and meaning to what state or local requirements the Commission 'shall preempt' as barriers to entry pursuant to section 253". NOPR at para. 22. A review of the legislative history of the Act indicates that the intent of § 253 (a) of the Act was to preempt "explicit prohibitions on entry by a utility into telecommunications." Consequently, the barriers that are referred to in subsection (a) are state laws or rules which act **a priori** to preclude **entry altogether** into the interstate or intrastate market at issue.

Clearly state interconnection policies are not the type of explicit prohibitions on entry contemplated under § 253(a). The types of requirements subject to preemption under § 253(a) are traditional barriers to entry which recognized only one monopoly local service provider with exclusive rights to provide service within its defined service territory. The FCC's interpretation would significantly expand its authority beyond that expressly contained in the statute, and would

and to Consider Generic Issues for Future Rulemaking, Docket No. M-940587.

be unlawful.

Had Congress intended to give the Commission the authority to preempt state interconnection standards it would have expressly provided for this in either §§ 251 or 252 of the Act. Neither § 251 or § 252 contain any such grant of authority. Indeed, the only authority given to the Commission to preempt matters pertaining to interconnection is contained at § 252(c)(5) which gives the Commission the authority to preempt a state commission's jurisdiction of a "proceeding or matter" if the state fails to act or otherwise carry out its responsibilities under the Act.

IV. Provisions of Section 251 (paras. 25-41).

A. Scope of the Commission's Regulations

This section of the NOPR focuses upon the general framework that the FCC will ultimately adopt to implement the general interconnection and unbundling requirements of § 251. We strongly urge the Commission to follow its stated intent in para. 26 to "... secure the full benefits of competition for consumers, with due regard to work already done by the states that is compatible with the terms and the pro-competitive intent of the 1996 Act."

The Commission appears to be contemplating the adoption of one of two almost diametrically opposed implementation schemes. The first option which the FCC has tentatively concluded it should adopt is a "single" set of "standards with which both arbitrated agreements and BOC statements of generally available terms must comply." NOPR at para. 36. The Commission explains in para. 28 that such an approach would "minimize variations among states".

The second option, which the Commission has tentatively decided not to adopt, is a

national policy which would recognize a range of different state interconnection policies that are consistent with the Act's objectives. The PaPUC strongly supports a framework modeled upon this second option which would recognize a range of state interconnection and unbundling policies which are consistent with the Act's objectives. We believe that this option is the only approach which will satisfy the requirements of the Act. Such a framework, unlike the Commission's preferred approach, is consistent with the requirements of § 251(d) which expressly requires the FCC to accommodate or incorporate state access and interconnection policies, orders or rules.

Since the FCC does not have the authority to preclude enforcement of any state interconnection policies which are consistent with the Act's objectives, the optimal or most effective federal framework would recognize a range of state policies that are consistent with the Act's objectives. The least effective federal framework and one which is contrary to the express language of the statute would attempt to set aside state regulations and determinations in this area and impose one-size-fits-all requirements without regard to the effectiveness of existing state interconnection policies. Congress expressly rejected this one-size-fits-all approach when it incorporated § 251(d) which requires the FCC to recognize state initiatives that are procompetitive in nature and consistent with the Act's objectives.

In para. 35, the Commission asks parties to comment on whether its rules implementing section 251 "can be crafted to allow states to implement policies reflecting unique concerns present in the respective states, without vitiating the intended effects of a scheme of over-arching national rules." We believe that they can by using option two above, and if a need for some degree of uniformity is identified, by incorporating minimum standards which would still make

provision for legitimate variation on a state by state basis to accommodate local conditions and concerns. The Commission itself identified significant problems associated with a highly inflexible, detailed system of national mandates. Such an approach "might unduly constrain the ability of states to address unique policy concerns that might exist within their jurisdictions." The Commission also noted that some variability may be necessary to recognize differences between technologies, geographic and topographical characteristics and other state or industry concerns specific to the area.

Still other important considerations weighing in favor of a more flexible federal regime which would permit variations between states were identified at para. 33 of the NOPR:

> States may also seek, to the extent permitted by sections 251, 252, 253, and 254, to ensure the uninterrupted delivery of certain services by the incumbent where competition might arguably threaten those services... It might also be argued that there is value to permitting states to experiment with different pro-competitive regimes to the extent that there is not a sufficient body of evidence upon which to choose the optimal pro-competitive policy.

NOPR at para. 33.

We believe that both the express wording of the statute and the important policy considerations discussed above weigh heavily in favor of option two, or a national policy which recognizes that a range of state interconnection and unbundling policies are consistent with the Act and which incorporates maximum flexibility through the adoption of minimum standards, which permit variances between states to accommodate local concerns and conditions. States would not be not free as the Commission presumes at one point to "establish disparate guidelines for intrastate interconnection with no guidance from the 1996 Act." Section 252(d)(3) imposes constraints upon the states to adopt intrastate interconnection policies that are consistent with the

Act.

We tentatively agree with the Commission's analysis contained in paras. 37-38 that Congress intended §§ 251 and 252 to apply to both the interstate and intrastate aspects of interconnection, service and network elements. We do not agree, however, with the Commission's analysis contained in para. 39 that § 152(b) of the Act which gives the states exclusive jurisdiction over the "... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier..." is inapplicable. We believe that the traditional state/federal jurisdictional lines remain intact unless otherwise provided under the Act. As the Commission notes, Congress expressly amended section (2)(b) in 1993 when its preempted state rate and entry regulation of CMRS providers. The absence of an express exemption in this case, strongly implies that it was Congress' intent that § 152((b) remain intact. This interpretation is bolstered by the language of § 252(d)(3) which provides that the Commission may not preclude state interconnection policies which are essentially consistent with the Act.

Finally, we believe that complaints alleging violations of the requirements set forth in §§ 251 or 252 should be resolved by the individual states. Both §§ 251 and 252 contemplate that state commissions actually implement the terms and conditions of the statute, and therefore, it would be most expedient and in line with general framework of the statute for states to undertake this role.

B. Obligations Imposed by Section 251(c) on "Incumbent LECs" (paras. 42-45)

In paras. 42-45, the Commission discusses the obligations of "incumbent LECs" under

the statute.[10] The Commission seeks comment on whether state commissions are permitted to impose on carriers that have not been designated as incumbent LECs any of the obligations of the statute imposes on incumbent LECs. We believe that the statute contemplates, through the provisions of § 251(d), that states may impose these obligations upon other carriers that have not been designated as incumbent LECs by the FCC. The FCC rules should be flexible to accommodate state policies in this regard.

1. Duty to Negotiate in Good Faith (paras. 46-48)

The first duty imposed upon an incumbent LEC under Section 251(c) is the "duty to negotiate in good faith." Under § 251(c)(1), "...each incumbent LEC has the ...duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill" its interconnection responsibilities. The Commission seeks comment on the extent to which it should establish national guidelines regarding good faith negotiation under § 251(c)(1). While some very general guidelines may be in order, the Commission should not develop inflexible standards which hamper the states' ability to weigh and balance the evidence in any given case when having to make a determination under § 271(c)(1)(B). The Commission can certainly not contemplate all of the various circumstances which may arise in the course of the negotiation process. Consequently, any rules in this regard, should be flexible enough to allow states to make § 271(c)(1)(B) determinations based upon the particular facts and

[10]An incumbent local exchange carrier is defined in section 251(h)(1) as a LEC that: (1) as of the enactment date of the 1996 Act, both "provided telephoen exchange service in such area" and "was deemed to be a member of the exchange carrier association pursuant to Section 69.601 of the Commission's regulations," or (2) "is a person or entity" that, on or after the enactment date of the 1996 Act, "became a successor or assign of a member" of the exchange carrier association.

circumstances in each individual case.

2. Interconnection, Collocation, and Unbundled Elements (paras. 49-55)

The Act's requirements relating to interconnection, collocation and unbundling are found at § 251(2), (3) and (6). In this section of the NOPR, the Commission once again raises the two alternative approaches to implementing § 251 discussed earlier in these comments. As already discussed, we support a policy which accommodates and incorporates state policies that are procompetitive in nature and consistent with the Act. The FCC should only set minimum standards where necessary and such standards must be broad enough to accommodate variation by states to take into account local conditions and concerns including differences due to technical, demographic or geographical variations.

In para. 52, the Commission mentions the approaches to interconnection taken by the New York and California Commissions. The Commission seeks comment on whether any elements of these state approaches should be incorporated into national standards implementing the 1996 Act. We believe the Commission's § 251 rules should be broad enough to accommodate either the New York and California Commission interconnection schemes and the procompetitive regulations of any other state. Clearly, it was the intent of Congress, that where state interconnection policies were consistent with the objectives of the Act, they would not be set aside by the FCC in favor of a nationalized policy.

(1) **Technically Feasible Points of Interconnection (paras. 56-59)**

Subsection 251(c)(2)(B) requires the incumbent LEC to provide interconnection at any technically feasible point within the incumbent LEC's network. The Commission seeks comment on what constitutes a "technically feasible point" within the incumbent LEC's network for

purposes of this section. We are considering this issue in a proceeding currently before us at the state level. We are not opposed to the concept of a federal minimum standard as long as it is flexible and permits some variation if found to be necessary or in the interest of parties at the state level. We do not believe that this would make it more difficult for a carrier to develop a regional or national network, but rather built in flexibility at the state level may actually promote efficient and more cost effective competitive service provisioning.

2. **Just, Reasonable, and Nondiscriminatory Interconnection. (paras. 60-62)**

Section 251(c)(2)(D) requires that the interconnection provided by the incumbent LEC be "on rates, terms and conditions that are just, reasonable, and nondiscriminatory. The Commission seeks comment on how to determine whether the terms and conditions for interconnection arrangements are just reasonable and nondiscriminatory. As discussed later in these Comments, the Commission uses this general provision as the basis for its interpretation that it has authority to mandate a national costing and pricing methodology under the Act. We believe that this interpretation conflicts with the language in § 252 of the Act which expressly delegates this authority to the individual states.

3. **Interconnection that is Equal in Quality (para. 63)**

Section 251(c)(2)(C) requires that the interconnection provided by the incumbent LEC be "at least equal in quality to that provided by the [incumbent LEC] to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection. We do not believe that detailed requirements are necessary with respect this provision. "Equal in quality" should mean interconnection which is virtually identical to that received by the incumbent itself or its affiliate with no noticeable difference between the two to the end-user consumer.

4. Relationship Between Interconnection and Other Obligations Under the 1996 Act (paras. 64-65)

Section 251(c)(2) addresses collocation and imposes upon the incumbent LEC the duty to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. We agree with the Commission's interpretation that this section does not expressly limit or constrain the Commission's authority to make available a variety of technically feasible methods for interconnection. We believe that this provision simply gives the Commission the authority to require "physical collocation", in light of the D.C. Circuit Court's partial reversal and remand in the Commission's Expanded Interconnection proceeding. As already stated, the optimal federal interconnection policy would accommodate a range of state policies in this area that are consistent with the objectives of the Act.

b. **Collocation (paras. 66-71)**

Section 251(c)(6) of the Act requires incumbent LECs to provide "for the physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the LEC, except that the carrier may provide for virtual collocation if the LEC demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."

We support the establishment of a national collocation policy that would allow for some variation among states. We believe such a policy would be advantageous in several respects. We agree that national rules with built in flexibility would make it easier for states to respond more appropriately to issues specific to that state or region. Additionally, most states now have

expanded interconnection and collocation policies in effect, and a more flexible policy at the federal level could accommodate these policies. Nonetheless, we also recognize that the statute contains a preference in favor of physical collocation where adequate space exists.

We do not believe it necessary for the FCC to establish guidelines for most states to apply when determining whether physical collocation is not practical for "technical reasons or because of space limitation." PaPUC has requested comment on this issue in its State Implementation Order on the 1996 Act. Similarly, we also do not believe that it is necessary for the FCC to adopt national guidelines to "prevent anti-competitive behavior by the manipulation or unreasonable allocation of space by either the incumbent LEC or new entrants."

c. **Unbundled Network Elements (paras. 74-82)**

Section 251(c)(3) imposes a duty upon LECs "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252." As the Commission notes, incumbent LECs are required to provide these network elements "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

PaPUC agrees with the Commission's tentative conclusion to identify a "minimum" set of network elements that incumbent LECs must unbundle for any requesting telecommunications carrier, and, to the extent necessary, establish additional or different unbundling requirements in the future as services, technology, and the needs of competing carriers evolve. The FCC's

policies should also, however, accommodate state unbundling policies, that may vary from the federal scheme, that are consistent with the Act's objectives. For instance, at para. 81, the Commission notes the different approaches taken to unbundling by several states. The Commission's national policy should accommodate these different state approaches.

(1) Network Elements (paras. 83-85)

Section 3(29) defines a "network element" as both "a facility or equipment used in the provision of a telecommunications service" as well as "features, functions, and capabilities that are provided by means of such facility or equipment." The Commission notes an apparent distinction, drawn in the definition of network element between the "facility or equipment used in the provision of a telecommunications service, and the service itself. The Commission inquires whether the purchase of access to an element entitles or obligates the requesting carrier to provide the customer with all services, intrastate and interstate that use the element.

The Commission also seeks comment on the relationship between § 251(c)(3) concerning unbundling and § 251(c)(4) which addresses resale of incumbent LEC services. We do not view § (c)(3) as in effect providing new entrants with an alternative way to resell the services of incumbent LECs in addition to the specific resale provision in (c)(4).

(2) Access to Network Elements (paras. 86-91)

Section 251(c)(3) requires incumbent LECs to provide "access" to network elements "on an unbundled basis." We agree with the FCC's initial interpretation of these terms as "requiring incumbent LECs for a fee to provide requesting carriers with the ability to obtain a particular element's functionality...separate from that of other functionalities or network elements, such as the local switch." We also agree that the term "unbundled" suggests that there must be a